ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	
Implementation of Sections 3(n) and 332 of the Communications Act	**GEN Docket No. 93-252**
Regulatory Treatment of Mobile Services	

To: The Commission

JOINT COMMENTS OF AIRTOUCH PAGING AND ARCH COMMUNICATIONS GROUP, INC. ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

AirTouch Paging and Arch Communications Group, Inc. are jointly commenting on the Further Notice of Proposed Rulemaking in the regulatory parity proceeding.

Generally, AirTouch and Arch support the approach taken by the Commission in seeking to reconcile Parts 22 and 90 of the Commission's rules. In certain respects, however, alternative courses of action are suggested. For example, the commenters recommend that the adoption of a new uniform licensing form be deferred until the transitional rules take shape.

There are several particularly important Part 22/Part 90 rule changes under active consideration in other dockets that are worth incorporating into this proceeding to accelerate their implementation. In particular, an increase in power to 3500 watts ERP for regional exclusive PCP systems and authorizing the use of a single system-wide call sign for all wide-area PCP systems, are worthy of immediate attention.

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AirTouch Paging ("AirTouch") and Arch Communications Group, Inc. ("Arch"), by their attorneys, hereby submit their joint comments in response to the Further Notice of Proposed Rulemaking, FCC 94-100, released May 20, 1994 (the "Further Notice") in the captioned proceeding. The following is respectfully shown:

I. Preliminary Statement

1. AirTouch holds numerous Part 22 (Public Mobile) and Part 90 (Private Mobile) authorizations for paging stations throughout the United States. Currently, AirTouch provides service to in excess of 1.2 million paging units throughout the country. By industry estimates, AirTouch is one of the largest paging service providers, and one of the fastest growing paging companies, in the United States.

2. Arch, through its affiliated companies, provides common carrier paging, private carrier paging ("PCP"), common carrier mobile and specialized mobile radio ("SMR") services to the public. Arch is a publicly-held company, and also enjoys a status as one of the fastest growing providers of wireless communications services in the country. The range of the Arch operations includes local systems, regional systems, and, more recently, nationwide systems.

3. As major providers of both common carrier and private carrier services, AirTouch and Arch have substantial experience concerning the differing regulatory treatments historically accorded these categories of service, and the practical difficulties that these disparities create. Both companies have actively participated in earlier stages of this regulatory parity proceeding, and thus, have developed considerable knowledge regarding the statutory mandate the Commission is seeking to satisfy. Based upon their backgrounds and experience, AirTouch and Arch have a substantial basis for informed comment in this proceeding.

II. AirTouch and Arch Generally Support the Proposed Rule Changes

4. AirTouch and Arch commend the Commission for initiating a broadbased transitional rulemaking proceeding under extremely short time deadlines. The subject matter is complicated and, in many instances, the best method of resolving differences between conflicting rule sections is not self-

evident. The Further Notice reflects considerable thought and an overall approach that is sound.

5. In particular, AirTouch and Arch wholeheartedly supports the Further Notice in the following regards:

a. The Commission proposal to incorporate the rule changes proposed in this docket on a service-specific basis into existing Part 90 and Part 22 rules, rather than attempting a "merger" of the two rule parts at this time, is sound. See Further Notice, note 11. Given the complexity of the two rule parts, and the limited amount of time available to adopt transitional rules, a wholesale rewriting of the rules at this time does not appear feasible. The Commission is correct, however, not to rule out the possibility of a merger of the two rule parts at a later date. AirTouch and Arch do encourage the Commission to merge the Parts in the future to ensure that both sets of rules have a common foundation and a common interpretation. To this end, both companies encourage the Commission to establish a single Bureau to handle all CMRS services, with at least two divisions: a narrowband division (dealing with paging) and a broadband division (dealing with cellular, ESMR, and broadband PCS).

b. AirTouch and Arch agree with the Commission's tentative conclusion that private and common carrier paging should be deemed substantially similar for statutory purposes. See Further Notice, para. 19. As the paging market has evolved, the choice between common carrier and private carrier frequencies generally has been made based upon frequency availability rather than upon differences in proposed service offerings. There also

are instances in which paging licensees using Part 90 frequencies below 900 MHz -- particularly the VHF PCP channels -- are presently providing service in competition with services provided by common carrier paging systems. The substantial similarity of all these services is established.

c. The Commission has tentatively concluded to focus primarily on identifying and conforming differences in the technical and operational rules in Parts 90 and 22 that would otherwise lead to arbitrary and inconsistent treatment of substantially similar CMRS licensees. See Further Notice, paras. 21, 22 and note 36. This is a prudent approach. In the process, the Commission need not be concerned whether it was Congress's intention, when referring to conforming "technical" regulations, to also have the Commission overhaul operational and processing rules. The simple fact is that the FCC has the authority under its general public interest mandate to conform operational and processing rules as it deems necessary to create regulatory parity.

d. AirTouch and Arch also believe that the Commission has the authority not to change existing rules if it concludes that differences are unrelated to competitive considerations or because changing the rules would create more hardships than benefits. See Further Notice, paragraph 24. AirTouch and Arch do not read the legislation as requiring uniformity in all bands in all services, but rather as an expression of Congressional intent to create a level competitive playing field. The focus of the Commission should be on those particular rule disparities that impact competition and which are

not technically infeasible. For instance, some of the VHF PCP channels have lower power levels, but higher power is not possible because of potential interference to adjacent channels.

e. The Commission proposes to adopt a uniform 12-month construction period for CMRS licensees under both Part 22 and Part 90 except in those services where a longer time period is specifically authorized. See Further Notice, para. 62. AirTouch and Arch support this proposal. A 12-month period has proved workable in the common carrier paging services. The shorter 8-month period for Part 90 stations has become inadequate as the size and complexity of private systems has increased. Conforming the two at the longer construction period is appropriate. AirTouch and Arch also support the inclusion of extended implementation schedules for common carrier paging identical to that accorded 900 MHz licensees. Under the 900 MHz PCP rules, licensees of a system proposing to construct more than 30 transmitters are permitted to construct their system over an extended period of time so long as they make a public interest showing and post a performance bond. AirTouch and Arch would support a similar arrangement for common carrier paging.

f. AirTouch and Arch support the Commission proposal to adopt a single unified application form that can be used by all commercial mobile radio services ("CMRS") in all terrestrial mobile services. Further Notice, para. 109. However, the adoption of a new form should be deferred until the transitional rules are in place. Separate forms place a substantial burden on carriers who must prepare and file a multitude of applications. The software required to prepare

applications, and the data bases that must be maintained to be able to pull up licensing information, become more complicated when the information called for and format of forms is not consistent. The only caveat that AirTouch and Arch would offer is that the Commission allow the transitional rules to be put in place before a new form is adopted. Carriers who prepare their own applications must develop appropriate software and data bases and will be in a better position to comment on a new form when they are familiar with the transitional rules. A postponement that would allow carriers to operate under the new rules for a period of time before the adoption of a new form would appear to make sense.

g. AirTouch and Arch also believe that the principle of regulatory parity requires that equivalent filing fees apply to substantially similar services. Further Notice, para. 115. However, as a result of streamlined licensing, it would appear appropriate to conform to the lower fee schedule which, in this case, is the private radio fee schedule.

h. It appears necessary as well, for the Commission to apply public notice and petition to deny procedures currently set forth in Part 22 to all CMRS applicants including Part 90 paging applicants. Further Notice, paragraph 118. One way for the Commission to guard against having these procedures delay the speed of the licensing process would be to require litigants to supply draft orders along with their pleadings in the hope that this procedure would enable the Commission to issue decisions more promptly after a substantive determination on the

merits had been made. Notably, the submission of draft orders is routine practice in state and federal court proceedings.

i. The Commission proposes to establish a uniform ten-year license term for all CMRS licensees and to extend existing rules and case law regarding renewal expectancy to all CMRS licensees. Further Notice, para. 139. AirTouch and Arch strongly endorse this proposal. Nothing would appear to be more basic to the concept of regulatory parity than giving providers of substantially similar service equivalent entitlements in terms of license term and renewal expectancy.

III. Comments on Questions Raised by the Commission

6. In some instances, the Further Notice declined taking a position on specific issues, but instead sought comment from the industry. The comments of AirTouch and Arch on these issues are as follows:

a. The Commission seeks comments on whether its channel assignment rules for 800 MHz and 900 MHz SMR facilities should be revised to facilitate licensing on a wider-area, multi-channel basis comparable to the licensing of cellular and PCS spectrum. Further Notice, para. 29. As a general matter, AirTouch and Arch believe that 800 MHz and 900 MHz SMR businesses are developing as competitors to cellular and will act as competitors to PCS services. If, as a result, the Commission moves toward wider-area, multi-channel licensing for these services, these carriers should be governed by the same general rules as apply to interconnected cellular carriers. AirTouch and

Arch also share concerns expressed in comments in the earlier 800 MHz and 900 MHz rule change proceedings that revised rules should be structured to encourage new market entrants and not unreasonably favor incumbent licensees. For example, AirTouch and Arch oppose the earlier Commission proposal in the 900 MHz SMR band which proposed an initial round of licensing in which incumbents could expand their service territories while newcomers were barred from applying. Otherwise, AirTouch and Arch favor having the Commission proceed with its 900 MHz Phase II proposal to introduce wide-area licensing in the 900 MHz SMR band.

b. The Commission has questioned whether the rules for assigning common carrier and private carrier paging frequencies in the 900 MHz paging band are sufficiently similar or whether further steps need to be taken to conform these procedures. Further Notice, para. 36. Of course, there are further changes in the Part 22 and Part 90 rules under consideration in other active docket proceedings. See CC Docket No. 92-115 (Part 22 Rewrite); PR Docket No. 93-35 (PCP Exclusivity Reconsideration). AirTouch and Arch believe that no additional changes should be made at this time in this docket. For example, both companies are proceeding to build-out extensive nationwide and regional systems based upon the recently adopted rules in the 900 MHz PCP exclusivity docket. Changes at this time in the rules governing 900 MHz PCP systems in this docket could prove to disrupt the prompt development of these PCP systems as full-fledged competitors to common carrier systems. While the Commission should keep open the possibility of taking additional steps to conform the 900 MHz common carrier and

private carrier paging rules in the future, for the time being the rules should stay as they are.

c. The Commission also seeks comment on whether it should continue to use station-defined service areas in 900 MHz paging generally or whether it is feasible to base future licensing on Commission-defined service areas. Further Notice, para. 37. There is, of course, a separate Part 22 Rewrite docket in which the procedures for licensing 900 MHz common carrier frequencies are under consideration. Specific comments regarding this licensing scheme are best presented in that docket proceeding. See e.g., Comments of AirTouch in CC Docket No. 92-115 filed concurrently herewith. AirTouch and Arch both support the use of wide-area market licensing for 900 MHz paging.

d. The Commission seeks comment on whether the statutory goal of comparable technical regulation for substantially similar services requires the revision of co-channel protection criteria in any mobile service. Further Notice, para. 40. AirTouch and Arch wholeheartedly support comparable technical regulation for all CMRS services whenever possible. Of course, for 900 MHz paging, the rules are different because of differences in the power levels permitted licensees. The Commission should conform the power levels between these services to the maximum extent possible, then conform the co-channel protection criteria accordingly. For example, the 70 mile separation rule in the 900 MHz PCP rules is a direct outgrowth of the power limitation of 1,000 watts. If the power level is increased, the separation rules will need to be changed accordingly.

e. The Commission seeks comment on whether existing height and power limitations for substantially similar Part 90 and Part 22 services should be amended. Further Notice, para. 48. AirTouch and Arch do believe that the Commission should act on the requests for reconsideration of its 900 MHz PCP exclusivity order, including increasing power for regional systems to 3500 watts. Indeed, the Commission should adopt the same power levels for 900 MHz private carrier paging as for 900 MHz common carrier paging. Further, AirTouch and Arch urge the Commission to take this opportunity to adopt the increased power suggested in CC Docket No. 93-116 for 900 MHz common carrier paging and apply it also to private carrier paging.

f. The Commission seeks comment on whether non-nationwide licensees at 929-930 MHz should be allowed to operate at up to 3500 watts within their existing service areas, as non-nationwide paging systems under Part 22 are currently allowed to do. Further Notice, para. 52. The answer is yes. AirTouch and Arch each have supported changes in the power limit rules for regional PCP systems to conform to the 3500 watt requirement. In fact, there would appear to be no reason to allow this higher power in all instances where the increased power would allow the operator to remain within the existing service areas.

g. The Commission is proposing to require that licensees not only complete construction but also commence service by the end of the construction period. AirTouch and Arch can support this proposal only if the rules specifically contemplate the granting of extended implementation schedules for wide-area paging systems. In view of language in the rules and

case law precedent indicating that extensions of construction deadlines will not be routinely granted, AirTouch and Arch believe it is essential for a procedure to be incorporated into Part 90 and Part 22 enabling carriers upon a showing of good cause to commence service to the public more than 12 months after the grant in connection with particularly complex systems. Any system involving 73 or more transmitters -- the number used for extended implementation purposes for exclusive PCP systems -- should automatically qualify. See Further Notice, para. 66.

h. The Further Notice seeks comment on the extent to which the Commission should continue to use loading standards as a means of insuring efficient spectrum use by CMRS licensees. Further Notice, para. 70. The use of loading standards implies that a uniform grade of service is appropriate for purposes of determining the point at which a channel should be taken back, or additional channels allowed to be added to an existing system. This premise is fundamentally flawed. The communications marketplace consists of many niches and carriers should be free to make their own determinations regarding the price/quality relationship between the services they offer to the public. As a general matter, the Commission should rely upon techniques other than loading standards to avoid spectrum warehousing. The most reliable would appear to be continuing to permit finders preference applicants to receive preferred licensing on spectrum found to be fallow.

i. The Commission proposes to adopt a general rule that CMRS licensees operating multiple station systems be allowed to use a single call sign on a systemwide basis. Further

Notice, para. 82. AirTouch and Arch strongly endorse this proposal. The current artificial limitations on the number of transmitters that can be included under a single call sign create significant operating inefficiencies for carriers.

j. The Commission seeks comments on how the rules for pre-grant construction should apply to CMRS applicants under both Part 22 and Part 90. Further Notice, para. 137. In the experience of AirTouch and Arch, permitting applicants to commence construction prior to the date of the license grant can materially advance the date on which the public receives service. In fact, AirTouch and Arch see no reason why pre-grant construction authorization should be limited to situations where no petitions or mutually-exclusive applications are on file. As long as it is understood that an applicant is proceeding at its own risk, there would appear to be no substantial risk in allowing applicants to commence construction at any time, provided that they comply with relevant environmental and aviation hazard rules.

k. The Commission considers its ability to permit pre-grant operation to be circumscribed by Section 309(f) of the statute. Further Notice, para. 138. This is unfortunate. Delays in the processing of Part 90 applications are inevitable by virtue of the imposition of public notice and comment procedures. Processing also is likely to slow down because of the demands that will be placed upon licensing personnel by the licensing of PCS spectrum. AirTouch and Arch encourage the Commission to add a rule that accords applicants, who have had facilities which are coordinated (if required) on Public Notice

without protest, temporary authority during the pendency of their license request to operate, with the condition that the licensee immediately turn off the facility at the Commission's request. If the Commission concludes it is unable to grant temporary authority, AirTouch and Arch encourage the Commission to seek statutory authority to permit pre-grant operation in those circumstances where no engineering, technical or interference challenge has been lodged against a pending application. Of course, any such pre-grant operation would be subject to immediate cessation in the event of interference problems.

1. The Commission proposes to allow the assignment or transfer of most CMRS licenses upon completion of construction, and to permit transfers of unconstructed licenses in circumstances where the transaction is involuntary, *pro forma* or does not involve a *de facto* change in control. Further Notice, paras. 141-142. However, the Commission seeks comments on whether CMRS licensees should also be allowed to assign or transfer unconstructed licenses under other circumstances. In the experience of AirTouch and Arch, anti-trafficking rules do not work. Changed circumstances can always be cited in support of an early transfer. Moreover, restrictions on transfer become increasingly unnecessary as auctions become the common mechanism for resolving mutually-exclusive application situations. Ultimately, the public interest is served if radio frequencies end up in the hands of licensees who find them to be most useful, which result is best achieved through the free alienation of licenses.

IV. Mutually-Exclusive Applications/Competitive Bidding

a. The Further Notice devotes considerable attention to the manner in which mutually-exclusive applications will be defined and disposed of for CMRS applicants. Further Notice, paras. 119 to 128. As a general matter, AirTouch and Arch do not favor first come-first served licensing, as this approach increases the possibility that existing licensees will be "boxed in" by strike applicants and deprived of an opportunity to file competing applications. AirTouch and Arch believe that competitive bidding procedures must generally be used to resolve competing CMRS applications under the new statutory scheme where the rules allow for mutually-exclusive filings.

b. There is, however, one significant aspect of the competitive bidding mechanism that AirTouch and Arch believe merits close attention by the Commission. Competing applicants for radio spectrum should be affirmatively encouraged to resolve their conflicts on a cooperative basis. Indeed, this result would appear to be compelled by Section 22.29(b) of the rules which encourages parties to settle their disputes among themselves. Such encouragement is not provided if, upon announcement of mutual exclusivities in the context of an auction, applicants are prohibited from implementing ownership changes that would enable parties to share frequencies rather than entering a "winner take all" auction. The auction rules should accommodate and encourage settlements.

c. The Commission has proposed to defer the issue of mutually-exclusive application procedures for 929-930

MHz paging frequencies since the rules governing 900 MHz PCP exclusivity are so newly adopted. AirTouch and Arch strongly agree with this approach. As earlier noted, both companies are in the process of building out extensive systems which have been planned with the current licensing rules firmly in mind. A change at this point to new rules could disrupt the development of these systems.

d. The Commission is proposing to utilize the definitions for "major" and "minor" amendments previously applied to Part 22 applications. This is a sound approach. These definitions have worked well over time and are supported by a body of case law that enables applicants to readily determine how a particular amendment will be classified.

e. At paragraph 132 of the Further Notice, the Commission questions whether competitive bidding should only be used in exceptional cases where major modification of an existing facility would fundamentally alter the nature or scope of the licensee's system. AirTouch and Arch have been concerned for some time that the existing Part 22 rules do not accord an incumbent licensee seeking to expand an existing system a sufficient opportunity to guarantee its access to a frequency. Circumstances in which the Commission has in fact allowed licensees to request comparative hearings have been narrowly defined by Commission decision. The result is a virtual stalemate in which two competing applicants going to lottery will have an equal chance to win the frequency even though one has a much better defined proposed use of the channel. On balance, AirTouch and Arch believe that these situations will be resolved

best by permitting these mutually-exclusive applications to go to competitive bidding. Obviously, the expansion site would likely prove to be more valuable to the carrier who is seeking to add it to an existing system than to a newcomer. Consequently, AirTouch and Arch do not believe competitive bidding should be limited to exceptional cases in this service.

V. CONCLUSION

7. The foregoing premises having been duly considered, AirTouch and Arch respectfully request that the rules be adopted in accordance with these comments.

Respectfully submitted,

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June 20, 1994

CERTIFICATE OF SERVICE

I, Tana Christine Maples, hereby certify that I have this 20th day of June, 1994, caused copies of the foregoing **Joint Comments of AirTouch Paging and Arch Communications Group, Inc. on the Further Notice of Proposed Rulemaking** to be delivered by hand, courier charges prepaid, to the following:

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